INDEX

		Page
1.	Copy of Notice to Counsel for Respondents and Acceptance of Service of the Date of Presenting This Motion - -	3
2.	Motion for Certiorari - - - - - -	5
3.	Petition for Writ of Certiorari - - -	6
4.	Statement of the Case - - - - -	14
5.	Points and Brief:	
	(I) No Power in One Partner, Alone, to Institute Proceedings - -	18
	(II) Power and Authority of Partners	22
	(III) No Power in a Partner to Institute Involuntary Proceedings Against His Partners as Individuals - -	24
	(IV) Effect of a Partner's Prior Death on Jurisdiction - - - - -	28
	(V) Scope of and Interpretation of General Order No. VIII - -	33
6.	Opinion of the Circuit of Appeals - -	39

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CASES CITED BY PETITIONER

Arthur *vs.* Cumming, 91 U. S. 362

Hobbs *vs.* McLean, 117 U. S. 567

Beckert *vs.* Filbert, 3 Watts & Sergeant (Penna.) 454

Hall *vs.* Lanning, 91 U. S. 160

Yonley *vs.* Lavender, 88 U. S. 276

In re Fackleman, 248 Fed. 565

In re Evans, 16 Fed. 590

In re Temple, 23 Fed. cases, 835

State *vs.* Tucson Gas Co., 15 Arizona 294

New Haven *vs.* Whitney, 36 Conn. 374

Township *vs.* Dubuque, 7 Iowa, 262

Scott *vs.* Ford, 52 Or., 288

25 Corpus Juris, Note 17 (c), page 220

Section 36, of the Bankruptcy Act of 1867

The Bankruptcy Act of 1898

CASES CITED IN OPINION OF CIRCUIT COURT OF APPEALS

In re Forbes et al., 128 Fed. 137-140

Francis *vs.* McNeal, 228 U. S. 695

Armstrong *vs.* Fisher et al., 224 Fed. 227

Yungbluth *vs.* Slipper et al., 185 Fed. 773

Vaccaro et al. *vs.* Secy. Bank of Memphis, 130 Fed. 436

In re Stem & Company, 127 Fed. 547

Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

GEORGE R. MEEK *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of George R. Meek, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

GEORGE R. MEEK
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, George R. Meek, by his counsel, Mortimer C. Rhone (with him Ellis L. Orvis and Harry Keller) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of George R. Meek, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2945, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Counsel for Petitioner.

GEORGE R. MEEK
Petitioner

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of George R. Meek respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

> "That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

GEORGE R. MEEK

MORTIMER C. RHONE,
Williamsport, Pa.
ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.
Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

George R. Meek being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

GEORGE R. MEEK,

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,
Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES
OF AMERICA
October Term, 1923.

GEORGE R. MEEK
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a voluntary petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
HARRY KELLER,
Bellefonte, Pa.

Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 March Term, 1923

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 March Term, 1923

FLORENCE F. DALE,

vs.

SAME

No. 2971 March Term, 1923

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Penn-

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.

INDEX

		Page
1.	Copy of Notice to Counsel for Respondents and Acceptance of Service of the Date of Presenting This Motion - -	3
2.	Motion for Certiorari - - - - -	5
3.	Petition for Writ of Certiorari - - -	6
4.	Statement of the Case - - - - -	14
5.	Points and Brief:	
	(I) No Power in One Partner, Alone, to Institute Proceedings - -	18
	(II) Power and Authority of Partners	22
	(III) No Power in a Partner to Institute Involuntary Proceedings Against His Partners as Individuals - -	24
	(IV) Effect of a Partner's Prior Death on Jurisdiction - - - - -	28
	(V) Scope of and Interpretation of General Order No. VIII - -	33
6.	Opinion of the Circuit of Appeals - -	39

CASES CITED BY PETITIONER

Arthur *vs.* Cumming, 91 U. S. 362

Hobbs *vs.* McLean, 117 U. S. 567

Beckert *vs.* Filbert, 3 Watts & Sergeant (Penna.) 454

Hall *vs.* Lanning, 91 U. S. 160

Yonley *vs.* Lavender, 88 U. S. 276

In re Fackleman, 248 Fed. 565

In re Evans, 16 Fed. 590

In re Temple, 23 Fed. cases, 835

State *vs.* Tucson Gas Co., 15 Arizona 294

New Haven *vs.* Whitney, 36 Conn. 374

Township *vs.* Dubuque, 7 Iowa, 262

Scott *vs.* Ford, 52 Or., 288

25 Corpus Juris, Note 17 (c), page 220

Section 36, of the Bankruptcy Act of 1867

The Bankruptcy Act of 1898

CASES CITED IN OPINION OF CIRCUIT COURT OF APPEALS

In re Forbes et al., 128 Fed. 137-140

Francis *vs.* McNeal, 228 U. S. 695

Armstrong *vs.* Fisher et al., 224 Fed. 227

Yungbluth *vs.* Slipper et al., 185 Fed. 773

Vaccaro et al. *vs.* Secy. Bank of Memphis, 130 Fed. 436

In re Stem & Company, 127 Fed. 547

Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

FLORENCE F. DALE *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of Florence F. Dale, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

FLORENCE F. DALE
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, Florence F. Dale, by her counsel, Mortimer C. Rhone (with him R. L. Bigelow and Ellis L. Orvis) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of Florence F. Dale, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2946, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Counsel for Petitioner.

FLORENCE F. DALE
Petitioner

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Florence F. Dale respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

> "That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

FLORENCE F. DALE
by Ellis L. Orvis her Attorney.

MORTIMER C. RHONE,
Williamsport, Pa.

R. L. BIGELOW,
Hazleton Pa.,

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

Ellis L. Orvis attorney for Florence F. Dale being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

ELLIS L. ORVIS

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,
Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1923.

FLORENCE F. DALE

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.

Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a **voluntary** petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

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R. L. BIGELOW,
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ELLIS L. ORVIS,
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Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 **March Term, 1923**

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 **March Term, 1923**

FLORENCE F. DALE,

vs.

SAME

No. 2971 **March Term, 1923**

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Pennsylvania.

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.

INDEX

Page

1. Copy of Notice to Counsel for Respondents and Acceptance of Service of the Date of Presenting This Motion - - 3

2. Motion for Certiorari - - - - - - 5

3. Petition for Writ of Certiorari - - - 6

4. Statement of the Case - - - - - 14

5. Points and Brief:
   - (1) No Power in One Partner, Alone, to Institute Proceedings - - 18
   - (II) Power and Authority of Partners 22
   - (III) No Power in a Partner to Institute Involuntary Proceedings Against His Partners as Individuals - - 24
   - (IV) Effect of a Partner's Prior Death on Jurisdiction - - - - - 28
   - (V) Scope of and Interpretation of General Order No. VIII - - 33

6. Opinion of the Circuit of Appeals - - 39

CASES CITED BY PETITIONER

Arthur *vs.* Cumming, 91 U. S. 362

Hobbs *vs.* McLean, 117 U. S. 567

Beckert *vs.* Filbert, 3 Watts & Sergeant (Penna.) 454

Hall *vs.* Lanning, 91 U. S. 160

Yonley *vs.* Lavender, 88 U. S. 276

In re Fackleman, 248 Fed. 565

In re Evans, 16 Fed. 590

In re Temple, 23 Fed. cases, 835

State *vs.* Tucson Gas Co., 15 Arizona 294

New Haven *vs.* Whitney, 36 Conn. 374

Township *vs.* Dubuque, 7 Iowa, 262

Scott *vs.* Ford, 52 Or., 288

25 Corpus Juris, Note 17 (c), page 220

Section 36, of the Bankruptcy Act of 1867

The Bankruptcy Act of 1898

CASES CITED IN OPINION OF CIRCUIT COURT OF APPEALS

In re Forbes et al., 128 Fed. 137-140

Francis *vs.* McNeal, 228 U. S. 695

Armstrong *vs.* Fisher et al., 224 Fed. 227

Yungbluth *vs.* Slipper et al., 185 Fed. 773

Vaccaro et al. *vs.* Secy. Bank of Memphis, 130 Fed. 436

In re Stem & Company, 127 Fed. 547

Section 5, of the Bankruptcy Act of 1898

General Order No. VIII, promulgated by the Supreme Court

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1923

ANDREW BREEZE *Petitioner,* *vs* CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts. *Respondents.*	Notice of Motion, Docket No.

To N. B. SPANGLER,
S. D. GETTIG,
Bellefonte, Pa.

Attorneys for Centre County Banking Company and John M. Shugert, Respondents:

Gentlemen:

Please take notice that upon a certified copy of the transcript of record in the above stated case, including the proceedings had in the Circuit Court of Appeals for the 3rd Circuit, and upon the annexed petition of Andrew Breeze, sworn to on the 11th day of September, 1923, we shall make the motion hereto annexed before the Supreme Court of

the United States at the Capitol in the City of Washington on the 8th day of October, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Yours, Etc.,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.
Attorneys for Petitioner.

AND NOW September 11th, 1923, we hereby accept service of the above notice and annexed petition.

N. B. SPANGLER,
Atty for Creditors' Committee.

S. D. GETTIG,
Atty for John M. Shugert, et al.

ANDREW BREEZE
Petitioner,
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts,
Respondents.

Motion for Certiorari.

And now comes the petitioner, Andrew Breeze, by his counsel, Mortimer C. Rhone (with him Ellis L. Orvis) duly admitted to practice in the Supreme Court of the United States, and moves your Honorable Court upon a certified copy of the transcript of the record in the above stated case, including the proceedings had in the Circuit Court of Appeals of the United States for the 3rd Circuit and upon the annexed petition sworn to on the 11th day of September, 1923, for a writ of certiorari directed to the Circuit Court of Appeals of the United States for the 3rd Circuit, and to the District Court of the United States for the Middle District of Pennsylvania, to bring before your Honorable Court the case of Andrew Breeze, petitioner, vs. Centre County Banking Company, a partnership and John M. Shugert, individually, bankrupts No. 2971, March Term, 1923, in the Circuit Court of Appeals of the United States for the 3rd Circuit recently decided by said Circuit Court of Appeals, and by the District Court of the United States for the Middle District of Pennsylvania, for such proceed-

ings therein as to this Court may seem just, and for such other further relief in the premises as may be just.

Respectfully submitted,

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.
Counsel for Petitioner.

ANDREW BREEZE
Petitioner
vs
CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.
Respondents.

Petition for Writ of Certiorari.

TO THE HONORABLE,
THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Andrew Breeze respectfully represents as follows:

FIRST: That heretofore, to wit on August

26th, 1922, the said John M. Shugert filed in the District Court of the United States for the Middle District of Pennsylvania, Docket No. 4268, an amended involuntary petition in bankruptcy (see record page 56) wherein he averred inter alia that he as an individual was insolvent; that the Centre County Banking Company, a partnership composed of himself, George R. Meek, Florence F. Dale, Andrew Breeze, Mary Harris, then living and Lavina Katherine Harris, then deceased, was likewise insolvent, and that each of said partners were insolvent and jointly and severally unable to pay the partnership debts; that the estate of Lavina Katherine Harris, a former partner, who died January 10, 1921, was in the custody of the Orphans' Court of Centre County, and of which estate John Blanchard and Sarah C. Brown were her executors.

The prayer of the petition is

"That such partnership as well as Geo. R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt within the purview of such bankruptcy law of 1898 as amended, and that service of this petition be made upon George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze, such non-consenting partners, and that proceedings may be had as are provided in said law and General Order VIII, of the Supreme Court as the Court may order."

SECOND: That your petitioner moved to dismiss the said petition in bankruptcy upon grounds stated therein (record 65).

A. That the District Court was without jurisdiction to allow or determine an involuntary petition

in bankruptcy against this petitioner filed by the said John M. Shugert.

B. That an involuntary petition in bankruptcy could only be filed and prosecuted by the required number of creditors and that only upon a proper averment that the petitioner had committed one or more of the several acts of bankruptcy defined in the Bankruptcy Act.

C. That the original petition filed by Shugert was a voluntary one on his part and the amended petition being a combination voluntary and involuntary petition the amendment was improperly allowed.

D. That where it appears upon the record that prior to the filing of a petition in bankruptcy by a surviving partner that the partnership was dissolved by operation of law by the death of one of the partners, and whose Estate was then in process of administration in the Probate Court, a surviving partner could not institute bankruptcy proceedings against the partnership.

E. That in the Bankruptcy Act of 1898 one partner cannot without the consent of his other partners institute bankruptcy proceedings to have the partnership declared bankrupt.

F. That insofar as General Order No. VIII of the Supreme Court of the United States attempts to confer jurisdiction upon Courts of Bankruptcy to adjudicate as bankrupts non-consenting partners, who refuse to join in a bankruptcy petition instituted by one partner, said General Order is in effect legislation at variance with the statute itself, and the enforcement of such order against your petitioner would be denying him the equal protection of the laws and amount to the taking of his property without due process of law.

THIRD: After argument had upon the motion to dismiss the Honorable Charles B. Witmer District Judge allowed the amended petition to be filed and directed a subpoena to issue as prayed for therein, and a subpoena was issued and served upon your petitioner (record 60) requiring him "to answer a petition filed by John M. Shugert in our said Court praying that you may be adjudged a bankrupt and to do further and receive that which our said District Court shall consider in your behalf."

FOURTH: The petitioner after this subpoena was issued appeared specially and for the purpose only of quashing the subpoena and to dismiss the amended petition upon the grounds above stated, which motions were denied by the District Court, and a petition to revise in matter of law was filed in the Circuit Court of Appeals, and that Court in an opinion by Judge Davis affirmed the order of the District Court. See opinion, page 42.

FIFTH: As the record now stands the District Court of the United States for the Middle District of Pennsylvania and the Circuit Court of Appeals for the 3rd Circuit have decided the following propositions of law which will be hereafter binding in the 3rd circuit at least, unless application for this writ of certiorari shall be granted and the orders so made reversed by the Supreme Court:

A. That one partner may without the consent and against the protest of the other partners institute and prosecute a bankruptcy proceeding against the partnership.

B. That one partner may maintain an involuntary petition in bankruptcy against his other partners without setting forth therein any of the Acts of

Bankruptcy defined in the statute, and notwithstanding the terms of the statute, which provide that only creditors may maintain involuntary bankruptcy proceedings.

C. That a surviving partner may institute bankruptcy proceedings to have the partnership declared bankrupt even where it appears upon the face of the petition so filed that several months prior thereto the partnership was dissolved by operation of law, viz., the death of one of the partners, and such partner's Estate is then being administered in the State Probate Court.

D. That the authority of the above propositions of law upon which the decision of the Circuit Court of Appeals and the District Court was founded, is General Order No. VIII promulgated by the Supreme Court after the passage of the Act of 1898, and which order is in almost identical language with that of General Order No. 18 made after the passage of the Act of 1867, which Act expressly provided that one partner might file a petition to have the partnership adjudged a bankrupt.

SIXTH: Your petitioner contends that the District Court and the Circuit Court of Appeals erred in refusing to quash the subpoena and dismiss the petition in bankruptcy vs. your petitioner and the partnership and that the decision of both Courts is at variance with the provisions of the bankruptcy statute, and of the following decisions of the Federal Courts upon the questions which Federal Courts have passed upon that are raised in this record, viz.,

Arthur vs. Cumming 91 U. S. 362.
Hobbs vs. McLean 117 U. S. 567.
25 Corpus Juris, note 17 (c) page 220.

Deckert vs. Filbert 3 W & S 454.
Hall vs. Lanning 91 U. S. 160; 23 L. E. 271.
Yonley vs. Lavender 88 U. S. 276; 22L E. 536.
In re Fackleman 41 A. B. R. 14; 248 Fed. 565.
In re Evans 20 A. B. R. 406; 16 Fed. 590.
In re Temple Fed. Cases No. 1-13825 and recorded in Vol. 23, Fed. cases at page 835.

Whereas the Circuit Court of Appeals and the District Court held that the case at bar is ruled by the following authorities.

Section 5 of the Bankruptcy Act of 1898.

General Order No. VIII promulgated by the Supreme Court.

In re Forbes et al, 128 Fed. 137-140.
Francis vs. McNeal 228 U. S. 695.
Armstrong vs. Fisher et al 224 Fed. 227.
Yungbluth vs. Slipper et al 185 Fed. 773.
Vaccaro et al vs. Secretary Bank of Memphis 130 Fed. 436-442.
In re Stem & Company 127 Fed. 547.

SEVENTH: That the questions that your petitioner desires among other things to have decided in this Court are as stated in the brief filed in the Circuit Court of Appeals as follows:

1. "Jurisdiction of the Bankruptcy Court to issue a subpoena upon the voluntary petition of one partner requiring remaining partners to show cause why they should not be adjudicated bankrupts individually.

2. Jurisdiction of the Bankruptcy Court to adjudicate a partnership bankrupt upon the sole

petition of one partner without the consent or assent of remaining partners.

3. Jurisdiction of the Bankruptcy Court to hear and determine a petition in bankruptcy filed by one partner to have the partnership adjudicated a bankrupt without consent or assent of remaining partners, where it appears upon the face of the petition that one of the alleged partners' Estate is then being administered in the Orphans' Court.

4. Scope of, and interpretation of the provisions of General Order No. VIII as applied to the case at bar."

EIGHTH: Herewith filed is the certified transcript of the record of the proceedings in the Circuit Court of Appeals for the 3rd Circuit and in the District Court of the United States for the Middle District of Pennsylvania, together with certified copies of the opinions of said Courts and of the order made by said Circuit Court of Appeals affirming the judgment of the District Court.

WHEREFORE your petitioner prays your Honorable Court to issue a writ of certiorari to the Circuit Court of Appeals of the United States for the 3rd Circuit, and the District Court of the United States for the Middle District of Pennsylvania, to send up the record in said case to the end that the manifold errors herein complained of may be corrected, and the order made by each of said courts be reversed and the petition to revise in matter of law

granted, and for such other and further relief as to your Honorable Court may seem just.

ANDREW BREEZE
by Ellis L. Orvis, his Attorney.

MORTIMER C. RHONE,
Williamsport, Pa.

ELLIS L. ORVIS,
Bellefonte, Pa.

Attorneys for Petitioner.

Dated at Bellefonte, Pa., September 11th, 1923.

State of Pennsylvania
County of Centre ss

Ellis L. Orvis attorney for Andrew Breeze being duly sworn deposes and says that he has read the foregoing petition and knows the facts therein set forth and the same are true to the best of his knowledge, information and belief, and that he believes them to be true.

ELLIS L. ORVIS

Sworn and subscribed to before me this 11th day of September, 1923.

BELLE WEAVER,

Notary Public.
My Commission expires February 2nd, 1925.
(SEAL)

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1923.

ANDREW BREEZE

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, individually, Bankrupts.

Petitioner's Brief

STATEMENT OF THE CASE.

John M. Shugert filed a petition in bankruptcy in the Middle District of Pennsylvania in which he sets forth that he individually is insolvent and that he "George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze who survive Lavina Katherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, with its principal place of business at Bellefonte, Pa.," and that the partnership is likewise insolvent. He further avers that "Lavina Katherine Harris who in her lifetime was a partner died on the 10th day of January, 1921, and that her estate is now being administered" in the Orphans' Court of Centre County, Pa. This original petition filed the 30th day of June, 1922, prayed

for a subpoena which was awarded and served upon the surviving other partners. That the petitioner and his co-respondents moved to quash and set aside the said subpoena upon the grounds, inter alia, that it was not responsive to the prayer of the petitioner in that it required the remaining living partners to show cause why each of them should not be individually adjudicated a bankrupt.

This motion to quash and dismiss was sustained in the District Court. But on the same day the petitioner (Shugert) was allowed to amend his original petition so as to read as follows:

> "Such partnership as well as the said George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breze and your petitioner surviving partners of Lavina Katherine Harris, deceased, may each individually as well as said firm be adjudged bankrupt * * * * that service of the petition, together with a subpoena be made upon the said George R. Meek, and other respondents, and that proceedings be had as provided in the Bankruptcy Act and General Order No. VIII."

About the same time, or shortly thereafter, the District Court appointed Ivan Walker Esq., Temporary Receiver of the partnership, so that said partnership assets are now being collected and conserved.

Following the filing of this amended petition a subpoena was issued (record 60) addressed "to George R. Meek, Mary C. Harris, Florence F. Dale

and Andrew Breeze, surviving partners of Lavina Katherine Harris, deceased, individually and trading as Centre County Banking Company," by the terms of which each of said individuals is required to appear to answer the petition filed by Shugert and **show cause why they as individuals** should not be adjudged bankrupts, and why said partnership should not be adjudged bankrupt.

George R. Meek, Florence F. Dale and Andrew Breeze filed their several motions to dismiss this amended petition and quash the subpoena for reasons set forth in the motion (record 65), this motion having been filed October 3, 1922.

The District Court without an opinion, denied the motion to dismiss, whereupon these three petitioners presented a petition to the Circuit Court of Appeals for the 3rd Circuit to revise the order of the District Court, and after argument thereon the Circuit Court of Appeals affirmed the order of the Court below, and these petitioners now ask this Court to issue a writ of certiorari to the Circuit Court of Appeals and the District Court to correct the errors complained of in the motion and brief filed.

Several questions of law are raised by the record that are novel, of wide public interest, and never heretofore analytically discussed and determined by this Court. So far as we can ascertain some of them have never been raised. There is a conflict of authority in the lower courts upon all these questions. As to the one involved by the death of Lavina

Katherine Harris upon the jurisdiction of the bankruptcy courts, an apparent conflict of authorities is admitted in the opinion of his Honor Judge Davis of the Circuit Court of Appeals.

So far as our search goes among the reported cases no partner has anywhere asked that his non-assenting co-partners shall be declared **individually** bankrupt, at least there is no authoritative decision that he may lawfully do so especially when he fails to aver that he is a creditor of the said remaining partners.

The questions involved are not only unique and novel because of their intrinsic importance and the lack of direct authoritative rulings thereon, but are rendered much more so by the attempt to combine in one procedure a voluntary bankruptcy with the involuntary bankruptcy both of the partnership itself and of the resisting surviving partners, and that too, without the intervention of a single creditor either of the petitioner, the partnership, or of the remaining members of the partnership.

But this does not state the whole of the complex problem thus created because the record further shows the additional complication caused by the prior death of Lavina Katherine Harris, thereby creating a conflict of jurisdiction between the Pennsylvania Probate Court, which has exclusive jurisdiction over the estates of decedents, and the Federal Court sitting in bankruptcy.

POINTS

I

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS BY THE DECISION IN THIS CASE HOLD THAT ONE PARTNER MAY WITHOUT THE CONSENT AND AGAINST THE PROTEST OF HIS OTHER PARTNERS INSTITUTE AND PROSECUTE A BANKRUPTCY PROCEEDING AGAINST THE PARTNERSHIP.

These petitioners contend that there is no authority in the Bankruptcy Act of 1898 or the amendments thereto which will warrant any such proceeding because there is no statutory authority for it. Bankruptcy proceedings are in derogation of the common law and the provisions of such acts of the Legislature are to be strictly construed.

The Bankruptcy Act of 1867 specifically authorized the filing of a voluntary petition by any one of the partners. The language in that Act being, Section 36.

> 'Where two or more persons who are partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them or on the petition of any creditor of the partners, a warrant shall issue, etc.'

Since Congress in the Act of 1867 expressly provided that a voluntary bankruptcy proceeding by the partnership might be instituted by any one of

the partners and did not in the Act of 1898 incorporate any such provisions, under well known rules for the interpretation of statutes, the presumption is that Congress intentionally omitted this provision, and having omitted it no such power is conferred by the Act of 1898.

There is no reason to assume that Congress omitted the 36th Section of the Act of 1867 from the present Bankrupt Act of 1898 by mistake or oversight. There is obviously a change in the legislative policy; caused by the numerous decisions in the federal courts criticising the unfortunate results arising from the presence of Section 36 in the older Act. It was recognized that the practice under said Section opened an easy door to rapacious and designing persons to oppress and harass their partners; besides in too many instances it made the bankruptcy practice intricate and cumbersome by reason of the collateral issues of law and fact thus introduceable.

The maxim borrowed from the Roman law *expressio unius est exclusio alterius* is so universally accepted as "A well settled legal maxim" and "The well establishd principle or maxim of law," and "As that universal and familiar rule" and "A rule both of law and equity," and "The well known maxim of construction and a very sound one;" that it would be an affectation to quote any of the multiplicity of authorities whether Federal, State, or of the English Courts.

We will limit ourselves to apply this maxim in

discussing the inclusion of Clause 36 in the earlier statute and its exclusion or any provision analagous thereto from the present bankrupt act.

"No maxim of the law is of more general and uniform application and it is never more applicable than in the construction and interpretation of statutes;" and "The maxim was never more applicable than when applied to the interpretation of a statute that *expressio unius est exclusio alterius.*"

Broom's Legal Maxims, 8th Edition, page 663.

We must bear in mind that the Act of 1898 was not a repeal, amendment or a supplement to the Act of 1867, for that Act had expired by its own limitations; however much of its provisions were reincorporated in the present legislation, and the rejection of Section 36 emphasizes the reason for applying the maxim above quoted and indeed necessitates its application.

"Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise."

25 Corpus Juris note "17 (c)" page 220.

State vs. Tucson Gas Company, 15 Arizona, 294.

New Haven vs. Whitney, 36 Conn., 374.

Township vs. Dubuque, 7 Iowa, 262.

Scott vs. Ford, 52 Or., 288.

While the Act of 1898 as just above stated has

not repealed the earlier Act of Congress, it is in fact a recodification, and its failure to include either Section 36 of the Act of 1867 or any similar provision implies in the strongest manner a negative.

"Possibly the strongest implication of a negative is found where subsequent statutes revise the whole matter of former ones."

Endlich on the Interpretation of Statutes, page 270.

So Mr. Justice Swain in delivering the opinion of the Supreme Court of the United States upon the construction of a revenue statute ruled that "The maxim *expressio unius est exclusio alterius* applies with cogent effect. This view is conclusive unless it is overcome by something else found in the statute."

Arthur vs. Cumming, 91 U. S. 362.

As Congress in 1898 refused to enact that "Partners in trade shall be adjudged bankrupt either on the petition of such partners or any one of them, a warrant shall issue," and the statute under which we are now living entirely omits any proceeding in bankruptcy by one partner against another, how can it be argued that our present legislation on bankruptcy provides for a procedure such as we have at bar, though formerly authorized by a statute now defunct, but expressly excluded from the Act of 1898? All the powers of the bankrupt court, all procedures to be followed therein are of statu-

tory origin and all its jurisdiction rests exclusively upon the statute of 1898 alone.

Hobbs vs. McLean, 117 U. S. 567.

The Supreme Court in the case of Hobbs vs. McLean 117 U. S. 567; 29 L. E. 940, said upon this question:

'Where a provision is left out of a statute either by design or by mistake of the legislator, the Courts have no power to supply it. To do so would be to legislate and not to construe.' "

II

POWER AND AUTHORITY OF PARTNERS.

The fundamental law relating to partnership in force throughout the United States and the rule in the Federal Courts is that:

> Unless authorized by the other partners or unless they have abandoned the business one or more but less than all the partners have no authority to—
>
> (A) Assign the partnership property in trust for creditors on the assignee's promise to pay the debts of the partnership.
>
> (B) Dispose of the good will of the business.
>
> (C) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(D) Confess a judgment.

(E) Submit a partnership claim or liability to arbitration or reference.

The Supreme Court of Pennsylvania many years ago decided in Dickert vs. Filbert 3 W. & S. 454 that one partner after the dissolution of partnership has no power to make a voluntary assignment of the effects of the partnership for the benefit of creditors without the consent of his co-partners.

The Supreme Court of the United States in Hall vs. Lanning 91 U. S. 160; 23 L. E. 271 decided that,

> "After the dissolution of a co-partnership one of the partners in a suit brought against the firm has no authority to enter an appearance for the partners who do not reside in the State where the suit is brought and have not been served with process."

Justice Bradley who delivered the opinion of the Court uses this language therein:

> "In the case of Bell vs. Morrison, 1 Peters 351 this court decided upon elaborate examination that after a dissolution of the partnership one partner cannot by his admissions or promises bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases even before dissolution one partner cannot confess judgment or submit to arbitration so as to bind his co-partners. It is well settled that after dissolution one partner cannot bind his co-partners by any contract or securities or impose upon them a fresh liability.

> Appearance to a suit does impose a fresh liability * * * * on principle therefore it is difficult to see how after dissolution one partner can claim implied authority to appear for his co-partners in a suit brought against this firm."

We say that it is certainly quite as grave an act upon the part of one partner to file a voluntary petition in bankruptcy in the partnership name without express statutory authority so to do, as it is to enter an appearance or submit a question to arbitration or to confess a judgment. In fact the filing of a voluntary petition in bankruptcy carries with it a confession of judgment because a decree of adjudication immediately follows and settles for all time by a judgment of the court that the partnership is insolvent. To use the language of Justice Bradley it is therefore upon principle difficult to see how after a dissolution of the partnership one partner can plunge the partnership into a voluntary proceeding in the absence of express authority so to do.

We respectfully submit that under the above authorities the District Court and the Circuit Court of Appeals erred in the orders made in this case.

III

AN INVOLUNTARY PETITION IN BANKRUPTCY CANNOT BE INSTITUTED AGAINST INDIVIDUALS UPON THE PETITION OF ONE ASSERTING HIMSELF TO BE A PARTNER IN

TRADE WITH THE INDIVIDUALS PROCEEDED AGAINST.

The bankruptcy act of 1898 declares that there shall be two kinds of bankruptcy, voluntary and involuntary. See Section 4.

The voluntary petition is instituted by the bankrupt himself by filing in court his petition and attaching thereto the schedules of his property and it makes no difference whether he is solvent or insolvent, for even a solvent person has a right to surrender his property to the bankruptcy court and have it administered therein. Collier on bankruptcy 12 Edition, page 141.

We concede that the several persons who constitute a partnership may agree among themselves to liquidate said partnership, whether solvent or insolvent, in the bankruptcy court; but we deny that one partner, against the consent of his co-partners, can institute a voluntary petition in bankruptcy for the partnership; much less can he do so as against his co-partners as individuals, notwithstanding the peculiar provisions of the defunct Act of 1867; because said provisions of the Act of 1867 are not embodied in the present act of 1898, but are omitted therefrom and because the said act of John M. Shugert in attempting so to do is a wrongful act, forbidden by the Pennsylvania Statute on partnerships as well as by the general law, because the said at-

tempted act of a partner necessarily would destroy the business of the partnership.

An involuntary proceeding can only be instituted by creditors against a person, firm or corporation (not excepted in clause B. of Section 4) that may owe debts of $1,000.00 or over and has committed one of the acts of bankruptcy specified in Section 3. The act further prescribes that in the case of the involuntary petition there shall be three or more creditors who have claims in excess of securities held by them in the aggregate amounting to $500.00 or over, unless it shall appear that there are less than twelve creditors in which case one creditor whose claim amounts to $1,000.00 or over may file such petition. Section 59.

The petition in this case is a multifarious affair. Shugert in his original petition first of all seeks to have himself adjudged a bankrupt individually. Then follows a prayer for the adjudication of a partnership which Shugert alleges to exist. Now in the amended petition, he attempts to institute against Meek and his other surviving partners an involuntary proceeding and prays that they may be adjudicated bankrupts **individually.** We say there is no authority in the bankruptcy act for any such three-cornered proceeding, nor is there any provision in the bankruptcy act which authorizes one partner to file an involuntary petition against his other partners.

Opposing counsel contend that authority for this proceeding is found in the case of Francis vs. McNeal 228 U. S. 695, 57 L. E. 1029, and the Circuit Court of Appeals seem to hold that this case controls the case at bar. A careful analysis of Francis vs. McNeal will disclose that it is not authority for the present proceeding.

Two questions were decided in this case:

1. That where an involuntary petition is filed against a partnership it must be alleged and proved not only that the partnership is insolvent but also that all the individual members of the partnership are also insolvent. That is to say that the aggregate property of all the partners and of the partnership is not sufficient to pay the debts of the partnership and the individual debts of the partners.

2. The Court decided that where an involuntary petition was filed against the partnership and the partnership was adjudicated a bankrupt the Court has jurisdiction to compel the other partners to file schedules of their property as provided in General Order No. VIII and if it shall be found that the aggregate property of both partnerships and individuals is not sufficient to pay all the debts, that the bankruptcy court has jurisdiction to administer the individual property of the individual partners.

The material difference between these two cases is that in Francis vs. McNeal an **involuntary** petition

was filed by the creditors, while in the case at bar a voluntary petition was filed by one partner, and that is the very thing we contend cannot be done where the purpose of the petition is to bring about the adjudication in bankruptcy of individuals, which we say can only be done by an involuntary petition filed by creditors.

IV.

PROBATE COURTS HAVE EXCLUSIVE JURISDICTION TO ADMINISTER THE ASSETS OF DECEASED PERSONS.

Both the original petition and the amended petion filed in this case state that—

> "Lavinia Katherine Harris (who in her life time was a partner in this business) died on or about the 10th day of January, A. D. 1921, and her estate will be administered by the Orphan's Court of Centre County upon the filing of the account by her executors."

And in the prayer of the petition it is stated that George R. Meek, Mary C. Harris, Florence F. Dale and Andrew Breeze are "Surviving partners of Lavinia Katherine Harris, deceased."

The Supreme Court of the United States long ago recognized the principle that the Probate Courts of the several States have full and exclusive control over the estates of deceased persons. In the case of Yonley vs. Lavender 88 U. S. 276; 22 L. E. 536 the

Supreme Court uses this language:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas (the same is true in Pennsylvania) the probate of wills and the grant of letters testamentary and of administration are matters entirely within the jurisdiction of the Probate Court. The legal effect of granting letters testamentary or of administration is to place the whole estate real and personal within the custody of the law and leave it there until the administration has been completed. In this way the assets are preserved that there may be a fair and equal division of them among the several creditors according to a scale of priority fixed by law * * * * all demands against deceased persons which are not liens upon specific property before the death of the debtor can only be collected by being brought under the administration of the Probate Court."

The Court then further considers the question in connection with the jurisdiction of the Orphans' Court in the State of Mississippi and cited the case of Williams vs. Benedict, 8 Howard 107. "The jurisdiction of the Orphan's Court had attached to the assets; they were in *gremio legis* and could not be seized by process from another Court."

We contend that the same rule of law prevails in connection with the bankruptcy law and that where one of the partners dies, thereafter the estate of such partner cannot be adjudged a bankrupt and it necessarily follows that there can be no bankrupt-

cy adjudication against the partnership one member of which is dead.

Collier on bankruptcy 12th Edition, Page 175.

Collier says that there is a conflict of authority upon this question, but he also recognizes the principle above quoted concerning the jurisdiction of the Probate Court and in discussing this case says:

> "The only difficulty had upon adjudication in such a case is the consequent interference with the administration of the Probate Court of the estate of the deceased partner. In the above absence of express statutory authority it would seem more consistent to leave the creditors to their remedy in the Probate Court. The apparent lack of jurisdiction in the bankruptcy court to adjudicate the bankruptcy of a partnership where one of the members is dead is unfortunate, but it leads to confusion rather than to denial of justice."

The Supreme Court of the United States has apparently not passed upon the question but there are a number of well considered cases which hold in accordance with the text in Collier just quoted.

In the case of Fackleman 41 A. B. R. 14; 248 Fed. 565 the matter is passed upon by Judge Bledsoe, Southern District of California, and he uses this language—

> "After his decease (the deceased partner) as to his estate no proceedings in bankruptcy can be had and the creditors labored under the necessity of submitting to the jurisdiction and judgment of the Probate Court."

The precise question under consideration here was passed upon by Judge Newman in the Northern District of Georgia, in the case of Evans, 20 A. B. R. 406; 16 Fed. 590 in which case he held,

> "Where a partnership is dissolved by the death of a partner it is not subject to bankruptcy and the voluntary petition in bankruptcy of the surviving partner affects only his individual estate."

This was also the decision of the courts under the bankruptcy act of 1867 the leading case upon the subject being in re Temple, Fed. Case No. 1 13825 and reported in 23 Fed. cases at page 835.

In this case Temple was a member of two partnership firms viz.:—Temple & Workman and Temple & Ledyard. He averred that both firms were insolvent and attached his individual schedule and the schedules of both firms. Adjudication followed and Temple as an individual and both partnerships were adjudged bankrupts.

After the petition in bankruptcy was filed and the adjudication made a creditor filed a bill in equity in the district court of California in behalf of himself and other creditors, in which it is set forth that both firms were insolvent and that Temple and the firm of Temple & Workman with intent to defeat the operation of the bankrupt laws had made an assignment of all their individual and partnership assets.

Temple likewise made an assignment of the as-

sets of Temple & Ledyard in trust for the satisfaction of creditors. It is further stated that assignees had taken possession of the property under circumstances which charged them with notice of the fact of insolvency.

The prayer of the bill is that in view of the fact that no assignee in bankruptcy had been appointed that (the assignees) Freeman and Spence might be enjoined from making any disposition or transfer of the assets conveyed to them under the assignment and that they be decreed to hold the same in trust for the assignee in bankruptcy to be elected.

The defendants, Freeman and Spence, the assignees referred to, filed a general demurrer and the Court in passing upon the question said:—

> "It is clear that the action of the register (the bankruptcy officer who made the adjudication under the act of 1867) adjudicating the firm of Temple & Workman and Temple & Ledyard to be bankrupt was wholly unauthorized and void. No notice was given to Ledyard as expressly required by rule 18 of the Supreme Court and Workman was dead at the time the court would commence proceedings. * * * * The act speaks of persons who are partners in trade and although partners are deemed to continue to be such, quoad creditors notwithstanding a former dissolution inter sese where there are joint assets and joint creditors it has never been held that a partnership dissolved by the death of one of the partners can be treated as still subsisting so as to be subject to the provisions of the bankrupt laws. * * * The status of a deceased person cannot be passed upon by a bank-

ruptcy court nor has he any property the title to which can vest in an assignee appointed in a proceeding by or against the surviving partners."

We therefore say to the Court that it appearing from the averments in both the original and amended petitions of John M. Shugert that the said petitioner, Meek, Breeze and Mrs. Dale are surviving partners of Mrs. Lavinia Harris and that the latter died in January, 1921, and her estate is now being administered in the Orphan's Court of Centre County, it necessarily follows that the District Court below is without jurisdiction and the said petitions should be dismissed."

V.

SCOPE OF, AND INTERPRETATION OF THE PROVISIONS OF GENERAL ORDER NO. VIII AS APPLIED TO THE CASE AT BAR.

The foundation for this whole proceeding is section 5 of the Bankruptcy Act of 1898 as supplemented by the provisions of General Order No. VIII.

Section 5 provides:—

(A) "A partnership during the continuance of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

(B) The court of bankruptcy which has juris-

diction over one of the partners may have jurisdiction over all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides:—

"Any member of a partnership who refuses to join in the petition to have the partnership declared bankrupt shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition and to make proof if he can that the partnership is not insolvent or has not committed an act of bankruptcy and to make all defense which any debtor proceeded against is entitled to take by the provision of the act."

General Order No. VIII is practically a repetition of General Order No. XVIII of the act of 1867, which act expressly provided that a subpoena in bankruptcy might issue either on the petition of the partners or **any one of them.** This provision having been omitted from the Act of 1898 we believe that the provisions of General Order No. VIII are broader than the act itself and insofar as its provisions are inconsistent with the Act itself it must abate.

We contend that Section B quoted above relates to the venue and is territorial in its application.

That is to say that if an involuntary petition in bankruptcy be filed by creditors against the partnership that the court in which the same is filed shall have jurisdiction over all the partners even though some of them live beyond the jurisdiction of the court in which the petition is filed. It certainly is not authority for the proposition that one partner contrary to the fundamental law governing partnerships may institute a proceeding that will destroy the partnership. One partner cannot make an assignment of the partnership assets; dispose of the good will of the business; do any act which would make it impossible to carry on the ordinary business of the partnership, or confess a judgment against the partnership.

It appears upon the face of this petition that more than six months prior to the filing of the petition the partnership was dissolved by operation of law (the death of Lavina Katherine Harris) and that her estate is being administered in the Probate Court. Whether her estate is solvent or insolvent does not appear and there is no averment in the petition itself regarding this matter. Just when this estate will be finally administered nobody knows. The other partners are entitled to have her estate duly administered before any liability is fixed upon them for the debts of the Centre County Banking Company. That is to say their liability cannot be measured until the exact status of the estate of this dead woman shall be ascertained, and there is no

provision in the law authorizing a trustee in bankruptcy to intervene in this estate, and at least two District Courts have held that where this situation arises there cannot be any bankruptcy proceedings against a partnership.

In the discussion of the foregoing points we have not commented on the reasons appearing in the opinion of the Circuit Court of Appeals affirming the order of the District Court. We have all along realized that courts of lower and intermediary jurisdiction would feel that Order No. VIII authorized by this Court would be more or less mandatory upon them. Thus it will appear from the said opinion that it is largely based upon its construction of said order as regulating the procedure under the Bankrupt Act of 1898. It would, therefore, seem to us all the more necessary that this Court shall decide in an adjudicated case whether or not the said lower Court's construction of General Order No. VIII is authorized by our present bankruptcy legislation, and especially whether the construction placed upon it by the lower courts in this case comes within the spirit and express legislation of Congress. We do not believe that this Court in said General Order had the purpose or intention of legislating the omitted provisions of the Bankruptcy Act of 1867 into the present Bankruptcy Act; nor do we concede that the strained construction placed upon said General Order, by the lower courts, in this case, is the proper and consistent one to carry out the real purposes thereof.

The learned court below establishes a basis for its reasoning by an implication that because the Act provides that "a partnership may be adjudged a bankrupt"—that it may be so adjudged by a process not authorized by the Act itself. To our mind this is a reversal of all the rules of statutory construction. There is clearly no intention of enlarging in the language of Section 5 of the Act of 1898 the jurisdictional power of the Federal Courts or of creating a process other than that explicitly laid down in the Act itself, and the learned Judge is driven to re-enforce his reason by calling in General Order No. VIII. It is true that there are some decisions in the lower courts sustaining the position as recited in the said opinion, but a number of rulings by other lower federal courts could be cited to the contrary. None of the questions here involved were before this court in Francis vs. McNeal, 228 U. S. 695, for in the said cited case the petitioner was a creditor in an involuntary proceeding and the resisting partner and respondent was held by this Court to have estopped himself by his own prior acts and agreements as appeared from the record; thus waiving all his status as a non-assenting partner.

Nor can it be fairly argued from the wording of Section 5c that the provisions of the prior Act of 1867 omitted from the Act of 1898 shall be read into it, for that is merely a proper provision to enable one district court, which has already jurisdiction, under the statute, over the partnership and one or more of the partners, to take jurisdiction over all

the remaining partners whether they happen to reside within that particular district or not.

Still more unsatisfactory is the reasoning in the opinion on the effect of the death of Lavina Katherine Harris. In fact, this phase of the question is really not discussed or fairly met in the said opinion. There is no attempt to meet the objections of the authorities holding to the contrary and no light or suggestion given to regulate the practice.

We, therefore, urge upon this Court the necessity of a careful revision, because the questions raised herein are of the widest public interest; because none of them have been finally determined in the highest court of the land; because no other tribunal than this one can frankly discuss whether or not General Order No. VIII is judicial or legislative in its essence; because there is pressing need for a uniform system and interpretation of the questions here raised in all of the several courts of this country; and because we believe the order and decree of the courts below is in violation of the fundamental rights of the petitioner as a citizen.

Respectfully submitted,

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Attorneys for Petitioner.

September 22nd, 1923.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 2945 **March Term, 1923**

GEORGE R. MEEK,

vs

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts.

No. 2946 **March Term, 1923**

FLORENCE F. DALE,

vs.

SAME

No. 2971 **March Term, 1923**

ANDREW BREEZE,

vs.

SAME

Petitions for Review from the District Court of the United States for the Middle District of Pennsylvania.

Before BUFFINGTON and DAVIS, Circuit Judges, and McKEEHAN, District Judge.

DAVIS, C. J.:

All three of these cases were argued together.

The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her Estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoenas on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5a and c, of the Act of 1898 provides that:

(a) "A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(c) The Court of Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

"Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not to voluntary petitions in bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5

of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires us to hold that it did? If the Act of 1898 had provided that "a partnership may be adjudged a bankrupt" on the petition of "any creditor," this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "any one" of the partners, and by "any creditor." The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that:

"Any member of a partnership who refuses to join in the petition—shall be entitled to resist the prayer" etc. By the words "join in," the Supreme Court had in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in." Judge Lowell held in the case of In re Forbes et al, 128 Fed. 137, 140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis vs. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other

to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong vs. Fisher et al, 224 Fed. 97; Francis vs. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth vs. Slipper et al, 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question!" Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al vs. Security Bank of Memphis et al, 130 Fed. 436, 442. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is

AFFIRMED.